

ARIZONA COURT OF APPEALS

DIVISION TWO

DAVID M. MORGAN and
TERRI JO NEFF, Petitioners,

vs.

HON. TIMOTHY B. DICKERSON,
Presiding Judge of the Superior Court
of the State of Arizona in and for the
County of Cochise, Respondent
Judge, and

STATE OF ARIZONA, ex rel. Brian
M. McIntyre, Cochise County
Attorney,

Real Party in Interest.

No. 2 CA–SA 2021–0007

Cochise County Superior Court
No. CR 2017–00516

**AMICUS CURIAE BRIEF OF THE ARIZONA PROSECUTING
ATTORNEYS' ADVISORY COUNCIL IN SUPPORT OF REAL PARTY IN
INTEREST STATE OF ARIZONA**

ELIZABETH BURTON ORTIZ, #012838
3838 N. CENTRAL AVENUE, Suite 850
Phoenix, AZ 85012
602-542-7222

Elizabeth.Ortiz@apaacaz.com

Attorney for Amicus Curiae

Arizona Prosecuting Attorneys' Advisory
Council

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES	3
INTRODUCTION	6
ARGUMENT	8
CONCLUSION	21

TABLE OF AUTHORITIES

Cases

<i>ABC, Inc. v. Stewart</i> , 360 F.3d 90 (2d Cir. 2004).....	11, 14
<i>Clark v. United States</i> , 289 U.S. 1 (1933)	17
<i>Commonwealth v. Long</i> , 92 A.2d 892 (Pa. 2007).....	12
<i>Commonwealth v. Silva</i> , 864 N.E.2d 1 (Mass. 2007)	13
<i>Ex parte Greenville News</i> , 482 S.E.2d 556 (S.C. 1997)	11
<i>Gannett Co., Inc. v. State</i> , 571 A.2d 735 (Del. 1990).....	10, 12
<i>Globe Newspaper Co. v. Superior Court</i> , 457 U.S. 596 (1982).....	passim
<i>In re Disclosure of Juror Names and Addresses (“Juror Names”),</i> 592 N.W.2d 798 (Mich. App. 1999).....	9, 12, 18
<i>In re Globe Newspaper Co.</i> , 920 F.2d 88 (1st Cir.1990).....	8
<i>In re South Carolina Press Assn.</i> , 946 F.2d 1037 (4th Cir. 1991)	14
<i>Jury Service Resource Center v. Muniz</i> , 134 P.3d 948 (Or. 2006).....	9, 10
<i>Press-Enterprise Co. v. Superior Court (“Press-Enterprise I”),</i> 464 U.S. 501 (1984).....	8, 11
<i>Press–Enterprise Co. v. Superior Court (“Press–Enterprise IP”),</i> 478 U.S. 1 (1986).....	9, 10
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980)	9
<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966).....	10, 16
<i>State v. Arvallo</i> , 232 Ariz. 200 (App. 2013).....	13
<i>State v. Bowles</i> , 530 N.W.2d 521 (Minn. 1995)	18, 19
<i>State v. Pennell</i> , 583 A.2d 1348 (Del. 1990)	12, 20
<i>State v. Rodriguez</i> , 2017 WL 443528 (Ariz. App. Feb. 2, 2017)	7
<i>State v. Sandoval</i> , 788 N.W.2d 172 (Neb. 2010).....	7
<i>United States v. Black</i> , 483 F.Supp.2d 618 (N.D. Ill. 2007).....	10, 16, 17
<i>United States v. Blagojevich</i> , 614 F.3d 287 (7th Cir. 2010).....	passim
<i>United States v. Brown</i> , 250 F.3d 907 (5th Cir. 2002)	113
<i>United States v. Bruno</i> , 700 F.Supp.2d 175 (N.D.N.Y. 2010)	11, 12, 15

<i>United States v. Calabrese</i> , 515 F.Supp.2d 880 (N.D. Ill. 2007)	12
<i>United States v. Doherty</i> , 675 F. Supp. 719 (D. Mass. 1987).....	17
<i>United States v. Honken</i> , 378 F.Supp.2d 880 (N.D. Iowa 2004).....	7
<i>United States v. Scarfo</i> , 850 F.2d 1015 (3d Cir. 1988).....	13
<i>United States v. Shryock</i> , 342 F.3d 948 (9th Cir. 2003)	13
<i>United States v. Wecht</i> , 537 F.3d 222 (3d Cir. 2008)	14, 16, 21
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984).....	10

Statutes

A.R.S. § 21-312.....	9
A.R.S. § 21-312(A).....	8
A.R.S. § 21-312(B)	8

Other Authorities

DAVID WEINSTEIN, “PROTECTING A JUROR'S RIGHT TO PRIVACY: CONSTITUTIONAL CONSTRAINTS AND POLICY OPTIONS, 70 TEMPLE L. REV. 1 (1997)	16, 19
https://www.techwalla.com/articles/how-to-find-a-persons-house-address-by-their-name	15
https://www.lifewire.com/search-engines-that-top-the-web-3482269	16
https://www.truthfinder.com/about	15
LARSEN, NAVIGATING THE FEDERAL TRIAL § 5:47 (2020)	12
MICHAEL R. GLOVER, COMMENT, THE RIGHT TO PRIVACY OF PROSPECTIVE JURORS DURING VOIR DIRE, 70 CAL. L. REV. 708 (1982)	19-20
NANCY J. KING, “NAMELESS JUSTICE: THE CASE FOR THE ROUTINE USE OF ANONYMOUS JURIES IN CRIMINAL TRIALS,” 49 VAND. L .REV. 123, 136-37 (1996)	15, 18, 19, 20

Rules

Ariz. R. Civ. P. 49	11
Ariz. R. Crim. P. 18.3	11

Ariz. R. Crim. P. 18.3(b).....	6
Ariz. R. Sup. Ct. 123(e)(10).....	6,7
Ariz. R. Sup. Ct. 42, ER 3.8 cmt. 1.....	8
Super. Ct. Local Prac. Rules, Maricopa County, 2.6(e)(1)(A)	7

INTRODUCTION

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) represents approximately 900 state, county, and municipal prosecutors. APAAC's primary mission is to provide training to Arizona's prosecutors. Additionally, the agency works collaboratively with community and criminal justice stakeholders on a variety of policy and public issues. On occasion, pursuant to Arizona Rule of Criminal Procedure 31.15, APAAC submits *amicus curiae* briefs on issues of significant concern. This is such an occasion.

APAAC has a substantial interest in the proper interpretation and application of the statutes and procedural rules concerning the confidentiality of juror information,¹ particularly because the superior courts of several counties, including

¹ See [A.R.S. § 21-312\(A\)](#) (“The list of juror names or other juror information shall not be released unless specifically required by law or ordered by the court.”); [A.R.S. § 21-312\(B\)](#) (“All records that contain juror biographical information are closed to the public and shall be returned to the jury commissioner, the jury manager or the court when jury selection is completed and may not be further disclosed or disseminated by a party or the party's attorney.”); [Ariz. R. Crim. P. 18.3\(b\)](#) (“The court must obtain and maintain juror information in a manner and form approved by the Supreme Court, and this information may be used only for the purpose of jury selection. The court must keep all jurors' home and business telephone numbers and addresses confidential, and may not disclose them unless good cause is shown.”); [Rule 123\(e\)\(10\), Ariz. R. Sup. Ct.](#) (“The home and work telephone numbers and addresses of jurors, and all other information obtained by special screening questionnaires or in *voir dire* proceedings that personally identifies jurors summoned for service, except the names of jurors on the master jury list, are confidential, unless

(continued ...)

Arizona’s most populous county (Maricopa), follow the practice of “refer[ring] to prospective and selected jurors by juror numbers rather than by their names during the jury selection process and during trial.” [*State v. Rodriguez*, 2017 WL 443528 *1, ¶ 4 \(Ariz. App. Feb. 2, 2017\) \(mem.\)](#).² The viability of this practice constitutes a

disclosed in open court or otherwise opened by order of the court.”).

² See [Rule 2.6\(e\)\(2\)\(A\), Super. Ct. Local Prac. Rules, Maricopa County](#) (“Juror Information is confidential and protected by statute and court rule, including [A.R.S. § 21-312](#), [Arizona Rule of Civil Procedure 49](#), [Arizona Rule of Criminal Procedure 18.3](#), and [Arizona Supreme Court Rule 123\(e\)\(10\)](#).”); [Rule 2.6\(e\)\(1\)\(A\), Super. Ct. Local Prac. Rules, Maricopa County](#) (“‘Juror information’ includes any personally identifying information of a juror, including but not limited to name, address, telephone number, email address, place of business, marital status, and felony status.”); [Rule 2.6\(e\)\(2\)\(C\), Super. Ct. Local Prac. Rules, Maricopa County](#) (“Attorneys and self-represented litigants shall use Juror Information solely for the purposes of the litigation and shall restrict the use of such Information to those persons working with the attorneys or self-represented litigants. Attorneys and self-represented litigants shall also take all reasonable steps to ensure that Juror Information obtained by them is not disseminated into the public domain.”).

Because this policy does not keep the identity of the jurors from the parties, the practice of referring to such known venire panelists by numbers in open court merely renders the jury “innominate” to the general public, but not “anonymous.” See [United States v. Honken](#), 378 F.Supp.2d 880, 919 (N.D. Iowa 2004) (using the term “innominate” to describe a jury composed of persons whose names were known to the parties, but to whom the judge and parties referred by number in open court); [Rodriguez](#), 2017 WL at *2, ¶ 10 (concluding that “the jury was not anonymous” where “[t]he court, counsel, and prospective jurors simply never said the prospective jurors’ names on the record.”); [State v. Sandoval](#), 788 N.W.2d 172, 196 (Neb. 2010) (“Generally, an ‘anonymous jury’ describes a situation where juror identification information is withheld from the public and the parties themselves.”).

matter of great concern to APAAC, which honors the principle that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” APAAC therefore wishes to ensure “that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.” [Ariz. R. Sup. Ct. 42, ER 3.8 cmt. 1](#). Because “protecting jurors’ privacy interests also implicates the integrity and reputation of the judicial process,” [In re Globe Newspaper Co., 920 F.2d 88, 95 \(1st Cir.1990\)](#), APAAC “has a similar interest in protecting juror privacy, even after trial—to encourage juror honesty in the future.” [Press-Enterprise Co. v. Superior Court \(“Press-Enterprise I”\), 464 U.S. 501, 515 \(1984\)](#) (Blackmun, J., concurring).

ARGUMENT

The empanelment of an innominate jury enhances the integrity of the criminal-justice system in the following ways: (1) venire persons publicly known only by number will be more forthcoming in revealing embarrassing information during *voir dire*—disclosures that will increase the likelihood of selecting impartial jurors who are fair to *both* parties; (2) the non-disclosure of juror names to the public will insulate the jurors from violence, intimidation, threats, and other external attempts to influence their decision—an outcome that will improve the quality of deliberations; allow jurors to base their verdicts solely upon the evidence; and avoid

wasting scarce judicial resources through mistrials, midtrial juror replacements, and retrials; and (3) potential jurors who are confident that they will remain anonymous during and after trial will be more receptive to jury service.

A. PERTINENT LAW.

“In a line of cases issued over the past quarter century, the United States Supreme Court has established that the First Amendment encompasses a public right to observe the workings of at least some parts of the administration of justice, particularly criminal trials. Consequently, trials must be conducted openly with full access to the public.” [*Jury Service Resource Center v. Muniz*, 134 P.3d 948, 951 \(Or. 2006\)](#).³ “In [*Press–Enterprise I*](#), the United States Supreme Court held that the public's constitutional right of access includes a right to attend the jury selection process in criminal trials.” [*In re Disclosure of Juror Names and Addresses \(“Juror Names”\)*, 592 N.W.2d 798, 801 \(Mich. App. 1999\)](#).

³ See [*Press–Enterprise Co. v. Superior Court \(“Press–Enterprise II”\)*, 478 U.S. 1, 10–12 \(1986\)](#) (recognizing right to public preliminary hearings); [*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604–05 \(1982\)](#) (“Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one.”); [*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 \(1980\)](#) (“The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance.”)

The Supreme Court subsequently held that the proponent of a First-Amendment right-of-access claim must satisfy a two-part test:

First, it must be demonstrated that “the place and process have historically been open to the press and general public.” *Id.* (experience test). Second, it must be shown that “public access plays a significant positive role in the functioning of the particular process in question.” *Id.* (logic test). The party alleging the existence of the qualified first amendment right must pass both parts of this threshold test.

Gannett Co., Inc. v. State, 571 A.2d 735, 742 (Del. 1990) (quoting *Press-Enterprise II*, 478 U.S. at 8). “If the test of experience and logic is satisfied, then the particular process is presumptively open. Nevertheless, a party successfully may overcome that presumption of openness by demonstrating an overriding interest, *i.e.*, by a showing that closure is essential to preserve ‘higher values’ and is ‘narrowly tailored to serve that interest.’” *Muniz*, 134 P.3d at 953 (quoting *Press-Enterprise II*, 478 U.S. at 9–10, 13–14).⁴

As attested by its decision in *Sheppard v. Maxwell*, 384 U.S. 333 (1966),

⁴ Accord *Globe Newspaper*, 920 F.2d at 97 n.10 (noting that “even First Amendment rights must give way to a defendant's right to a fair trial [and] may have to bow to a court's needs to protect its essential processes, including the jury system, from violence, fraud and other influences that threaten the objectivity and independence of jurors”); *United States v. Black*, 483 F.Supp.2d 618, 622 (N.D. Ill. 2007) (“Even when a First Amendment right of access exists it is not absolute, but rather “may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information.”) (quoting *Waller v. Georgia*, 467 U.S. 39, 45 (1984)).

which reversed a murder conviction following sensational media coverage that compromised the jury's impartiality, the Supreme Court placed at the apex of the "higher values" pyramid "the right of the accused to a fair trial." [*Press-Enterprise I*, 464 U.S. at 508](#). But the Supreme Court also recognized that this presumption of openness may be overcome by juror privacy concerns. [*Id.* at 511-13](#) (recognizing "a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain," authorizing closed proceedings to conduct sensitive inquiries before counsel and the court reporter, and permitting the redaction of the juror's name from the transcript).⁵ Because the juror's interests in privacy extend beyond the verdicts, "a trial court may decline to release jurors' names, even after the trial has concluded." [*United States v. Calabrese*, 515 F.Supp.2d 880, 882 \(N.D. Ill. 2007\)](#)

⁵ See also [*Press-Enterprise I*, 464 U.S. at 519](#) (Stevens, J., concurring) ("As the Court recognizes, the privacy interests of jurors may in some circumstances provide a basis for some limitation on the public's access to *voir dire*."); [*id.* at 520](#) (Marshall, J., concurring) ("[T]he constitutionally preferable method for reconciling the first amendment interests of the public and the press with the legitimate privacy interests of jurors and the interests of defendants in fair trials is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses"). Since this landmark decision, "numerous courts have found privacy interests worthy of protection as higher values or countervailing factors." [*United States v. Bruno*, 700 F.Supp.2d 175, 182 \(N.D.N.Y. 2010\)](#). Accord [*ABC, Inc. v. Stewart*, 360 F.3d 90, 98 \(2d Cir. 2004\)](#); [*United States v. Brown*, 250 F.3d 907, 918 & n.10 \(5th Cir. 2002\)](#); [*Ex parte Greenville News*, 482 S.E.2d 556, 558 \(S.C. 1997\)](#).

(collecting cases).⁶

Because the Supreme Court has not yet addressed whether the disclosure of juror names implicates the First Amendment right to access, lower courts applying the experience and logic tests have reached inconsistent conclusions. *Compare Gannett*, 571 A.2d at 743 (finding neither part of threshold test satisfied); *Juror Names*, 592 N.W.2d at 808 (“We therefore hold that the press has a qualified right of post-verdict access to juror names and addresses, subject to the trial court’s discretion to fashion an order that takes into account the competing interest of juror safety and any other interests that may be implicated by the court’s order”); *Commonwealth v. Long*, 92 A.2d 892, 899-906 (Pa. 2007) (finding both prongs satisfied, but recognizing that trial court may deny request to disclose juror names upon finding “closure is essential to preserving higher values and is narrowly tailored to serve that interest”).

B. THE VIRTUES OF INNOMINATE JURIES.

⁶ Accord *Bruno*, 700 F.Supp.2d at 182-83 (“The conclusion of the trial does not remove the jurors’ interest in privacy and protection from harassment.”); *State v. Pennell*, 583 A.2d 1348, 1357 (Del. 1990) (listing scenarios justifying a decision “to withhold jurors’ names post-verdict”); *LARSEN, NAVIGATING THE FEDERAL TRIAL* § 5:47 (2020) (“The continuation of juror anonymity at the conclusion of the trial is not necessarily prohibited if there is a reasonable basis for post-verdict protection. For example, continued anonymity may be necessary to protect the jurors from harassment by the press and public following the return of a controversial verdict in a case that has generated a lot of public interest.”).

Without doubt, the physical safety of prospective and selected jurors is the paramount concern militating in favor of referring to prospective and selected jurors by number as opposed to by their actual name.⁷ Indeed, juror safety is the *raison d'être* for the empanelment of truly unanimous jurors, whose identities remain unknown to all but the court. See [United States v. Shryock](#), 342 F.3d 948, 971 (9th Cir. 2003) (collecting cases). And “[i]t goes without saying that no case has been called to our attention in which a public right to juror information was held to override a legitimate concern for juror safety.” [Silva](#), 864 N.E.2d at 8. That being said, the empanelment of innominate juries and preserving juror anonymity after trial advance the criminal justice system’s goals in other ways.

1. Greater likelihood of truthfulness during voir dire.

While the purpose of *voir dire* is to empanel a jury that is impartial and fair to

⁷ See [Globe Newspaper](#), 920 F.2d at 95 (“In addition, jurors summoned from the community to serve as participants in our democratic system of justice are entitled to safety, privacy and protection against harassment.”); [United States v. Scarfo](#), 850 F.2d 1015, 1023 (3d Cir. 1988) (“Jurors’ fears of retaliation from criminal defendants are not hypothetical; such apprehension has been documented.”); [State v. Arvallo](#), 232 Ariz. 200, 96-97, ¶¶ 11-13 (App. 2013) (court alleviated jurors’ midtrial concern for their own personal safety by promising confidentiality and reminding them that they were known only by number); [Commonwealth v. Silva](#), 864 N.E.2d 1, 7 (Mass. 2007) (“The safety of jurors is crucial to the functioning of the judicial system. ... If jurors doubt the system’s ability to protect them from violence, cooperative service is discouraged and public confidence in the rule of law is diminished.”).

both parties, courts and commentators alike agree that “public knowledge of jurors’ identities might actually increase the risk of misrepresentation at *voir dire*, because some jurors will be tempted to lie in order to avoid the disclosure of embarrassing information.” [*United States v. Wecht*, 537 F.3d 222, 238 \(3d Cir. 2008\)](#).⁸ Conversely stated, “the potential jurors will be more candid in their responses if they do not have to worry about what the public’s opinion of those responses might be.” [*In re South Carolina Press Assn.*, 946 F.2d 1037, 1044 \(4th Cir. 1991\)](#).⁹ The winnowing of

⁸ Accord [*Stewart*, 360 F.3d at 99](#) (“Prospective jurors, if made aware that their views will be publicly disseminated in the next day’s newspapers or radio or television broadcasts, will be under pressure not to express unpopular opinions relevant to their choice as trial jurors.”); [DAVID WEINSTEIN, “PROTECTING A JUROR’S RIGHT TO PRIVACY: CONSTITUTIONAL CONSTRAINTS AND POLICY OPTIONS,” 70 TEMPLE L. REV. 1, 32 \(1997\)](#) (hereinafter “WEINSTEIN”) (“Rather than facilitating detection of impartiality, publicizing jurors’ names may have the opposite effect. Jurors who know that their identities will become a matter of public record may become less, rather than more, willing to disclose information on *voir dire* that may prove relevant to their potential bias.”).

⁹ Accord [*Wecht*, 537 F.3d at 263](#) (“If anything, the anonymity of prospective and trial jurors, especially in high profile cases, is more consistent with the proper and fair functioning of the judicial process.”) (Van Antwerpen, J., dissenting); [*Bruno*, 700 F.Supp.2d at 182](#) (“The interest in protecting jurors’ privacy rights strengthens the integrity of our justice system by assuring their rights to safety and privacy and by encouraging the candor of impaneled and prospective jurors and future venire.”) (collecting cases); [NANCY J. KING, “NAMELESS JUSTICE: THE CASE FOR THE ROUTINE USE OF ANONYMOUS JURIES IN CRIMINAL TRIALS,” 49 VAND. L. REV. 123, 136-37 \(1996\)](#) (hereinafter “KING”) (“Anonymity would permit a juror to disclose information freely, knowing that, absent the special showing outlined above, only a few authorized court employees could trace whatever the juror reveals

(continued ...)

jurors harboring bias against either party avoids many adverse consequences—the conviction of the accused by a partial juror, the expenditure of additional judicial resources to retry the defendant, an unjust acquittal that the prosecution cannot appeal under prevailing double- jeopardy principles, and the victim suffering justice delayed or denied.

2. The benefits of innominate juries extend beyond jury selection.

The dissemination of information exposing the jurors’ identity to the public has the potential to undermine the criminal-justice system, even when the court has succeeded in empaneling a truly impartial jury.¹⁰ For instance, “when the names of

to herself or her family.”).

¹⁰ Although Petitioners seek only the names of the jurors who served at trial, they do so because they need nothing else to successfully contact them, especially given the biographical information disclosed during *voir dire* and the ease of locating a person online with just a name. *E.g.*, <https://www.truthfinder.com/about> (“With just a first and last name, you can access a detailed report about almost anyone. Whether you’re looking up a celebrity or your high school crush, searches with TruthFinder are unlimited.”); <https://www.techwalla.com/articles/how-to-find-a-persons-house-address-by-their-name> (“It may seem like a daunting task to find an individual’s address by his name alone, but it is possible. It can, however, cost a small fee. Finding information such as a person’s home address costs extra because it is sensitive and personal.”); <https://www.lifewire.com/search-engines-that-top-the-web-3482269> (“9 Best People Search Engines for Finding Anyone. ... Finding people online is easy if you have the right tools. You can track down someone’s phone number, figure out their address, see their relatives, dig up their email address, read arrest records, and more when you use a people search engine.”).

jurors are public, friends or enemies of a criminal defendant may find it easier to influence the jury's decision. In an extreme case, this could take the form of threats to the jurors or their family members.” [Wecht, 537 F.3d at 238](#).¹¹ Should any juror be exposed to such threats or other prejudicial outside effort to influence the verdict, the trial court would be required to take corrective actions that expend scarce judicial resources, such as calling alternative jurors into service or declaring a mistrial, to avoid reversal on appeal following any conviction.

Measures designed to keep jurors from being publicly known, such as the innominate-jury system, may also improve the quality of deliberations by: (1) alleviating the distraction occasioned by worry of media exposure and third-party

¹¹ Accord [Sheppard, 384 U.S. at 362](#) (“Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.”); [United States v. Blagojevich, 614 F.3d 287, 93 \(7th Cir. 2010\)](#) (noting that “[a] degree of anonymity safeguards jurors from intimidation during trial”) (Posner, J.); [Globe Newspapers, 920 F.2d at 95](#) (“Where a juror may reasonably fear retaliation from criminal defendants, jury anonymity promotes impartial decision-making.”); [Black, 483 F.Supp.2d at 630](#) (“[T]o disclose the jurors’ names in a high-profile trial such as this would create the unnecessary risk that, during the course of the trial, jurors will be subjected to improper and presumptively prejudicial contact.”); [WEINSTEIN, 70 TEMPLE L. REV. AT 27](#) (“Where the press seeks this information during a trial, it raises the specter that jurors will be subject to public intimidation and pressure to reach a particular verdict, potentially implicating the defendant’s right to a fair trial.”).

intimidation, thereby enhancing the juror's ability to focus on the evidence and fully participate in the deliberative process;¹² and (2) increasing the likelihood that the jurors will speak freely and not be deterred by the prospect of the subsequent publication of their statements.¹³

Furthermore, courts and commentators alike have noted that jurors identified

¹² See [Blagojevich, 614 F.3d at 293](#) (“A degree of anonymity ... reduces jurors’ anxiety (which may improve jury deliberations).”) (Posner, J.); [Black, 483 F.Supp.2d at 628](#) (“In a case like this that has garnered intense national and international media attention, releasing juror names during the pendency of trial threatens the integrity of the jurors’ ability to absorb the evidence and later to render a verdict based only on that evidence”); [KING, 49 VAND. L. REV. AT 137](#) (“Because it can reduce jurors’ fears of retaliation and exposure, anonymity may also improve the deliberations of a jury. One jury consultant has explained that ‘anxious jurors are less able to logically follow an argument. Anxiety produces loose cannon jurors who could be more influenced by their biases or courtroom drama than by the evidence.’”).

¹³ See [Clark v. United States, 289 U.S. 1, 13 \(1933\)](#) (“Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world ... No doubt the need is weighty that conduct in the jury room shall be untrammelled by the fear of embarrassing publicity.”); [Blagojevich, 614 F.3d at 293](#) (noting that “[a] degree of anonymity ... promotes vigorous debate in the jury room”) (Posner, J.); [United States v. Doherty, 675 F. Supp. 719, 724 \(D. Mass. 1987\)](#) (“For one juror to make public the thoughts and deliberations of his or her colleagues in the deliberation room will ‘chill’ the free flowing process that our system encourages, especially if other jurors come to believe that it is the accepted practice for jury deliberations to be freely discussed once the verdict is returned.”); [Juror Names, 592 N.W.2d at 808](#) (“Uninhibited and frank jury deliberations are essential to our system of justice. That frankness would be jeopardized if jurors refrained from speaking freely because they fear for their safety should their names and comments become public knowledge.”).

after trial have been harassed and threatened for having returned unpopular verdicts, regardless of whether the defendant was convicted or acquitted:

Jurors who acquitted the officers who beat Rodney King endured taunts, threats, and disturbing telephone calls after their names were made public. Death threats also haunted the jurors in the trial of Dan White, convicted of murdering San Francisco Mayor George Moscone and Supervisor Harvey Milk. Some of these jurors moved or changed jobs after their trial. One slept with an axe; another bought a gun. A Houston woman reportedly received threatening phone calls and letters from the cellmate of the man whom she and her fellow jurors had convicted. In Fort Worth, a defendant reportedly telephoned a juror at home and made threatening comments after his lawyer had given him the juror's questionnaire. Jurors in California have reported harassing or threatening mail from prisoners they convicted. In Florida, a kidnapping victim, outraged at the jury for acquitting his alleged captor, obtained the names of the jurors through the state public records law and sent them each a letter "saying that he hoped that someone close to them died a 'horrible, lingering death' so they would know how he felt."

[KING, 49 VAND. L. REV. AT 127-28](#) (footnotes omitted).¹⁴ Given these pervasive

¹⁴ See also [State v. Bowles, 530 N.W.2d 521, 531 n.15 \(Minn. 1995\)](#) ("We take judicial notice that jurors in the highly public and emotional trial of Robert Guevera, an accused who was acquitted of the sexual assault and murder of a 4-year-old child, experienced harassment from the media and the public after the acquittal, which occurred just two months before the commencement of *voir dire* in Bowles' trial."); [KING, 49 VAND. L. REV. AT 129 & n.31](#) ("After the trial, the integrity of jurors is commonly attacked in the press by those who cannot accept the verdict. ... For example, the jurors who considered the cases against the Menendez brothers were accused in the media of being charmed and duped. John Hinkley's jurors, as well, were maligned for their decision."); [WEINSTEIN, 70 TEMPLE L. REV. AT 28](#) ("Moreover, jurors whose identity has been revealed post-trial have been the subject

(continued ...)

instances of post-trial harassment, jurors will be tempted to cast their gaze beyond the trial evidence and the court's instructions and concern themselves with which trial outcome will be most palatable (or least offensive) to the media and public.¹⁵

Finally, "if the risks of personal humiliation, damage to reputation, and personal embarrassment are minimized by protecting prospective jurors' privacy, the general reluctance of citizens to serve as jurors may be reduced, and the task of compiling a competent and conscientious jury may be easier." [MICHAEL R. GLOVER, COMMENT, THE RIGHT TO PRIVACY OF PROSPECTIVE JURORS DURING VOIR DIRE, 70 CAL. L. REV. 708, 712 \(1982\)](#). Anecdotal evidence from trial judges supports this conclusion:

of threats and harassment by those disagreeing with their verdict, and even by the defendant.”).

¹⁵ See [Blagojevich, 614 F.3d at 293](#) (observing that “[a] degree of anonymity ... allows jurors to focus on the facts rather than on how the public might receive their verdict”) (Posner, J.); [Globe Newspapers, 920 F.2d at 96 n.9](#) (“The defendant, however, has a ‘fair trial’ interest in not having his guilt or innocence decided by a juror who deliberates with an eye towards what some other juror may say about him in the press or on national television.”); [Bowles, 530 N.W.2d at 531](#) (“[T]he publicity surrounding the murder and the trial put pressure on the jury to convict. The jurors could have reasonably concluded that were they to acquit Bowles, they or their families would be vulnerable to harassment from the public. The jurors’ anonymity may have actually protected them from this pressure, helping to preserve their impartiality.”); [KING, 49 VAND. L. REV. AT 141 & n.77](#) (“As the Chief Judge of the Hennepin County bench explained, pillory of jurors by the press and public may lead to a ‘situation where the jury is making the politically correct decision,’ a throwback to what he describes as the racially driven verdicts in the South decades ago.”).

Finally, juror anonymity promotes jury participation. In the Superior Courts of Los Angeles County, where for a time anonymity was routinely provided, jurors reported feeling “safer” and “relieved” by their nameless status. “I kept thinking I was glad [the defendant in a domestic assault case] didn't have a lot of information about me,” said one. Ninety percent of those responding to one survey about jury service said that they would be more willing to serve on a criminal trial if juror anonymity were guaranteed. Following reports of threats to jurors by an angry victim in Florida, the rate of juror “no shows” doubled. Judge Gregory Mize of the District of Columbia Superior Court spoke for many judges when he warned that attention to jurors may “make people more hesitant to serve because most of our citizens ... don't enjoy the spotlight.”

[KING, 49 VAND. L. REV. AT 139](#) (footnotes omitted). Consequently, the innominate-juror system at issue here—like other judicial efforts to maintain juror confidentiality—may reasonably be expected to “make[] people less reluctant to serve on juries.” [Blagojevich, 614 F.3d at 293](#) (Posner, J.). Cf. [Pennell, 583 A.2d at 1357](#) (“For example, in a case where community reaction to the verdict is at a fever pitch; or, where community tensions are at an extremely high level, the release of jurors’ names could prevent the jurors’ return to their communities without severe harassment. In that case, the Court must be able to act to protect the jurors, and therefore, the jury system.”).

Conversely, “if jurors know that the media will attempt to contact them or their families, they may resist serving on high-profile cases at all because they fear that their privacy will be threatened.” [Wecht, 537 F.3d at 238](#). Accord [Globe Newspapers, 920 F.2d at 91](#) (“Failure of the court to shield jurors from threatened

harm could seriously damage the functioning of the courts and the jury system. Were jurors to feel that their personal safety was at risk, they might not only be reluctant to serve but might tailor verdicts so as to forestall harm to themselves, thus depriving the parties of an impartial jury.”).

CONCLUSION

The innominate-jury system employed in the instant case, as well as in several other counties in Arizona, substantially furthers the goals of the criminal justice system, including the preservation of the defendant’s right to a fair trial and fostering jury service.

RESPECTFULLY SUBMITTED this 25th day of March 2021.

BY: /s/ Elizabeth Burton Ortiz
ELIZABETH BURTON ORTIZ
Attorney for *Amicus Curiae*
Arizona Prosecuting Attorneys’
Advisory Council